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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

Barron County Department of Human Services,  
Petitioner

DECISION

v.

FOF/161038

[REDACTED] Respondent

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**PRELIMINARY RECITALS**

Pursuant to a petition filed October 06, 2014, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Barron County Department of Human Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on November 18, 2014, in Barron County, Wisconsin.

NOTE: The record was held open to give the Petitioner an opportunity to submit a January 29, 2014 ACCESS application. It has been marked as Exhibit 6 and entered into the record.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

**Petitioner:**

Department of Health Services  
Division of Health Care Access and Accountability  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Aaron Borreson, Fraud Investigator  
Barron County Department of Human Services  
Courthouse Room 338  
330 E. Lasalle Ave.  
Barron, WI 54812

**Respondent:**

[REDACTED]  
[REDACTED]  
[REDACTED]

**ADMINISTRATIVE LAW JUDGE:**

Mayumi M. Ishii  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. On December 10, 2013, someone signed a FoodShare application for the Respondent (CARES # [REDACTED]). It was received by the county agency on December 16, 2013. (Exhibit 3)
2. On December 19, 2013, the Respondent completed a phone interview, indicating that she resided with her three children, but did not receive child support. The Respondent indicated that she was attempting to secure child support payments. (Exhibit 4).
3. On January 29, 2014, the Respondent electronically signed a Child Care application, in which she reported having three children in her home, ages 13, 5 and 1. (Exhibit 6)
4. On July 9, 2014, Investigator Borreson spoke to the Respondent, who indicated that she and her boyfriend broke up on an unspecified date and he kept the youngest child, [REDACTED], for a time. Mr. Borreson indicated that the Respondent told him that [REDACTED] was living with the boyfriend, "at the time of the applications." [REDACTED] later had equal "custody" of [REDACTED] after "March", but after she lost daycare [REDACTED] returned to his father's home in April 2014. (Exhibit 2; testimony of Mr. Borreson)
5. On October 8, 2014, Mr. Borreson sent the Respondent an Administrative Disqualification Hearing Notice, indicating the Respondent, "applied for FS benefits stating her youngest child [C.] was in her household. At the time of application [REDACTED] was living with his father." (Exhibit 1)

## DISCUSSION

### *Respondent's Non-appearance*

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

*Emphasis added*

The hearing in this case took place on November 18, 2014. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at [REDACTED]. Mr. Borreson indicated that this was the Respondent's last known mailing address and that the agency did not receive any returned mail.

The Respondent did not provide a phone number where she could be reached at the time of the hearing. Mr. Borreson provided two phone numbers, both of which were attempted without success. The first

number, [REDACTED] was no longer in service; however a voicemail was left at an alternate number [REDACTED]. The hearing then proceeded in the Respondent's absence.

The Respondent did not contact the Division of Hearings and Appeals within ten days of the hearing to explain her absence. Accordingly, it is found that she did not have good cause for her failure to appear.

### *The Merits of OIG's Claim*

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

7 C.F.R. § 273.16(c); *see also* Wis. Stat. §§ 946.92(2).

The Department's written policy restates federal law, below:

#### **3.14.1 IPV Disqualification**

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

*FoodShare Wisconsin Handbook*, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the elements have been proven.

In the case at hand, the county agency asserts that the Respondent lied in her December 2013 application for Foodshare benefits, when she claimed that her youngest son, [REDACTED], resided with her. Mr. Borreson testified credibly that the Respondent admitted to him that she lied on her FoodShare application when she stated [REDACTED] resided with her. Mr. Borreson memorialized this conversation in his report that is contained in Exhibit 2. Accordingly, it is found that the Respondent made a false or misleading statement in her December 2012, Foodshare application.

In order to prove the second element, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. State v. Lossman, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977). There is nothing in the record to rebut the presumption that the Respondent, intentionally lied

about her son's presence in her home, in order to receive more FoodShare benefits than she was otherwise entitled to receive.

### **CONCLUSIONS OF LAW**

That the Respondent committed a FoodShare IPV, as defined in 7 C.F.R. § 273.16(c), by providing false information in her Foodshare application.

**THEREFORE, it is**

### **ORDERED**

That the petitioner's determination is sustained, and that OIG may disqualify the Respondent from the program for one year effective the first month following the date of receipt of this decision.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

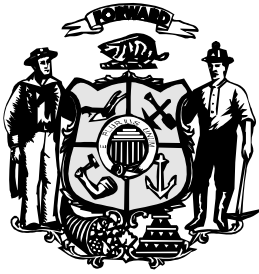
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 2nd day of December, 2014.

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\sMayumi M. Ishii  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on December 2, 2014.

Barron County Department of Human Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[Aaron.Borreson@co.eau-claire.wi.us](mailto:Aaron.Borreson@co.eau-claire.wi.us)